Supreme Court, U.S.
FILED

041606 MAY 24 2005

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No. 04-

IN THE
# Supreme Court of the United States

Michael T. Benson,

Petitioner,

v.

Tommy G. Thompson, Secretary
Department of Health and Human Services

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## PETITION FOR A WRIT OF CERTIORARI

Michael T. Benson
Pro Se
2703 Waco Court
Baltimore, MD 21209
301-827-2311 office
410-484-7262 residence

## QUESTIONS PRESENTED

1. Whether an employment disability discrimination claim under the Rehabilitation Act of 1973, as amended (the Act) may be maintained when Petitioner contacted an EEO Counselor within 45 days of being denied one reasonable accommodation request, and that contact was more than 45 days after earlier identical requests were denied?

2. Alternatively, when death is a foreseeable outcome of denial of a request for reasonable accommodation under the Act, should an exception be carved out to eliminate the 45-day requirement to contact an EEO Counselor?

3. Whether the denial of a cash award bonus to a Federal employee constitutes an adverse employment action in a charge of retaliation?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael T. Benson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS AND ORDERS BELOW

Reproductions of the following are included in the appendix to this petition:

February 23, 2005 Order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's request for rehearing and rehearing en banc.

Unpublished October 27, 2004 opinion of the United States Court of Appeals for the Fourth Circuit affirming the District Court of Maryland's decision.

April 1, 2004 Memorandum and Order denying Petitioner's Motion to Alter or Amend a Judgment.

Unpublished March 22, 2004 Memorandum opinion And Judgment Order of the District Court of Maryland granting summary judgment in favor of Respondent.

## JURISDICTION

The judgment of the court of appeals was entered on October 27, 2004. The court of appeals denied rehearing en banc on February 23, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## RELEVANT STATUTORY AND REGULATORY PROVISIONS AND RULES

The relevant statutory provisions, regulatory provisions and rules are reproduced in the Appendix at 45A-51A.

## STATEMENT

The Equal Employment Opportunity Commission (EEOC) granted Respondent's motion for decision without a hearing on Petitioner's employment disability discrimination complaint under the Rehabilitation Act of 1973, as amended (the Act) in 29 USC 791 *et seq*. EEOC's Office of Federal Operations affirmed. Petitioner timely filed a trial de novo complaint in the district court alleging one count (Count I) of employment disability discrimination, and 2 counts of retaliation (Counts II and III) for pursuing his claim in the EEOC. The district court granted Respondent's Motion for Summary Judgment on the 3 counts, and denied Petitioner's Motion for Reconsideration of Counts I and III only.

Petitioner alleges that Respondent violated the Act as implemented by 29 CFR 1614.203(b) by employment disability discrimination and by retaliation pursuant to 29 USC 791(g) as it applies to the Americans with Disabilities Act of 1990 (ADA) under 42 USC 12203(a).

Disability Discrimination Count I

The provisions of 29 USC 791(b) point out that special needs of individuals with disabilities are to be met by Federal agencies. Provisions of 29 USC 791(g) state that standards in the ADA are used to determine whether the Act has been violated by employment discrimination. The ADA at 42 USC 12201(a) cross references the Act.

The Act has been implemented by regulations at 29 CFR 1614.203 which provides definitions and requirements at 1614.203(a), (b), and (c) applicable to this case. One requirement in 29 CFR 1614.203(b) states in pertinent part "An agency shall not discriminate against a qualified individual with physical-----handicaps." Another requirement in 29 CFR 1614.203(c) states in pertinent part "An agency shall make reasonable accommodation to the known physical-----limitations of an -----employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program."

Petitioner has been diagnosed with post polio syndrome (pps) of the respiratory muscles resulting in a weakened diaphragm muscle which cannot sufficiently inflate the lungs. Consequently, he is unable to inhale sufficient air which contains about 20% oxygen. This disability results in Petitioner's symptoms of a rapid heart rate caused by low oxygen levels on slight exertion. This condition is further exacerbated by a severe scoliosis from his original polio of the abdominal muscles which limits expansion of the lungs within his ribcage.

Sitting in a car seat for approximately an hour and 20 minutes on the way to work resulted in his increased heart rate and caused him to be on the verge of passing out several times, thus, exacerbating his pps symptoms. Petitioner was working from home 2 days a week which helped to alleviate the frequency of those symptoms. Petitioner assumed his own risk in driving to work on days he didn't work at home. Other of his colleagues also worked at home 2 days a week.

Although Petitioner's work had not been rated less than satisfactory, Petitioner was blamed for an error in a response letter. Respondent's officials stopped allowing him to work at home and said he had to submit documentation in support of his request for a reasonable accommodation (RA) to work at home 2 days a week. On numerous occasions, Petitioner submitted documentation to Respondent's physician, Dr. James Vorosmarti Jr. including:

(1) Respondent's fact sheet NIH Publication No. 96-4030 which said that in general, pps is not life threatening except in cases of severe respiratory impairment

(2) Letter from Petitioner's orthopedic surgeon who recommended the RA and advised that sitting in a low car seat for a prolonged time hampers the mechanics of respiration.

(3) Letter from Petitioner's physiatrist who also recommended the RA and advised that sitting in a car seat restricts lung expansion which can worsen hypoxia, and can cause carbon dioxide retention, fast heart beat, and distress.

(4) Petitioner's memorandum reporting of respiratory difficulties while driving to work, including being helped by another motorist who was kind enough to stop and try to assist him on a rainy day.

Dr. Vorosmarti denied every one of Petitioner's requests for a RA. One of his denials said that a Dr. Bradley agreed with him. Subsequently, during an EEOC investigation, Dr. Vorosmarti signed an affidavit that he did not consult with other physicians about Petitioner's case. Petitioner did not get a copy of that affidavit and was not aware of it until a year after he initiated contact with an EEO counselor. That contact was made less than 45 days after the last denial of Petitioner's request for a RA. The contact was also made more than 45 days after other earlier denials of the same request.

Petitioner's Complaint alleges that the continuous denial of his requests for RA caused him to suffer on the way to work and shortly after arriving at work, and that he used 4 days of sick leave which could have been worked had he been allowed to work from home on those days (Apx. 30A-31A). It was after using a volume ventilator before leaving for work in the morning that Petitioner learned that his symptoms were less of a struggle for him. By using a pulse oximeter to measure oxygen saturation levels and pulse rate, he could know when his volume ventilator inflated him with enough air to show a saturation level of oxygen to where he felt confident enough to leave for work with less likelihood of respiratory distress while driving.

The district court opinion states that Petitioner does not allege a hostile work environment, nor does Petitioner present evidence of such conduct to create a hostile work environment (Apx. 16A). The complaint alleges that notwithstanding the weight of the evidence submitted to him, Dr. Vorosmarti refused to consult with either of Petitioner's physicians and refused to recommend a RA for him to work at home (Apx. 33A). The complaint also alleges that on 4 dates that Petitioner could have worked at home if permitted, he used sick leave because of feeling unable to cope with weather conditions (Apx. 31A).

In the district court, Petitioner submitted an affidavit from his treating physiatrist (physical medicine specialist) who gave his opinion that

- Dr. Vorosmarti was wrong to say "There is no other medical information about his respiratory problem that I feel is needed---",
- Dr. Vorosmarti misinterpreted Petitioner's symptoms as "anxiety attacks",
- Dr. Vorosmarti's refusal to consult any respiratory specialist in restrictive pulmonary conditions was deplorable.

The district court opinion (Apx. 16) states that all Count I alleges to ground liability is an unreasonable and adverse decision by FDA administrators. The opinion called the adverse decision a single act based on the complaint which says (Apx. 34) "Dr Vorosmarti's opinion refusing to grant me a RA to work at home----." Dr. Vorosmarti's denial notices were included in the record submitted to the district court. Finding a single act and not multiple acts, the district court opinion says this act is neither severe nor pervasive, and that Petitioner nowhere alleges the kind of systemic harassment that significantly alters employment conditions.

In a denial of one of Petitioner's requests for a RA, Dr. Vorosmarti wrote about using tranquilizers as a treatment option. Tranquilizers do not treat insufficient oxygen levels that cause rapid heartbeats. As a pharmacist, Petitioner has seen many patients treated with antidepressants after starting on tranquilizers.

Treatment of Petitioner's disability has ramifications that apply to those who do not have his disability. Although it is known that oxygen slows the heart rate, Petitioner has found that sleeping with added oxygen gives a more restful sleep and enables him to fall asleep quicker than without it. Petitioner has also checked his blood sugar levels daily and has found that they have been lower after sleeping with added oxygen than without it. Petitioner explains how the public can benefit from this information under Reasons for Granting the Writ.

Count III Retaliation

The following events chronologically occurred:

(1) December 27, 1999: Petitioner's second line supervisor wrote a memorandum that Petitioner could work at home twice a week based on his performance over the past year.

(2) January 24, 2000: Petitioner filed an Appellant's Brief of his employment discrimination claim with EEOC's Office of Federal Operations, and sent a copy to Respondent.

(3) January 31, 2000: Petitioner's former immediate supervisor rated his final performance evaluation for 1999 "fails to meet performance measures."

(4) February 1, 2000, Petitioner's second line supervisor signed Petitioner's final performance evaluation for 1999 as reviewing official and didn't see any of Petitioner's work for the period being rated.

(5) February 22, 2000: Respondent's Appellee's Brief to EEOC's Office of Federal Operations contained a statement that Petitioner received a rating of "fails to meet performance measures" for 1999.

Petitioner appealed the rating which was overturned. Subsequently, his second line supervisor said "over the past year" in his December 27, 1999 memorandum meant the performance evaluation for 1998.

Bonus cash awards were given to employees in Petitioner's division. According to Petitioner's calculations submitted to the district court, the average cash award to each eligible employee was approximately $718.00. Petitioner didn't get one and asked his second line supervisor the criteria for awarding bonuses. The second line supervisor said it was based on performance and refused to award a bonus to Petitioner. The money for that cash award bonus was from a budgeted amount for use by the division.

Petitioner's complaint did not mention that he did not receive a cash award bonus as a result of the initial rating of "fails to meet performance measures," however Petitioner submitted an affidavit on that point to the district court. The district court opinion said in footnote 6 that Petitioner didn't show any loss in compensation resulting from the initial negative rating (Apx. 24A).

## REASONS FOR GRANTING THE WRIT

### I(a). The Courts Below Erroneously Held that Petitioner's Case was Time Barred.

Petitioner's employment disability discrimination claim under the Rehabilitation Act of 1973, as amended should not have been time barred because a series of separate discriminatory acts collectively constituted an "unlawful employment practice" in a hostile work environment when one of Petitioner's acts fell within a regulatory period even though other acts did not.

The circuit courts of appeals were divided on whether to allow continuous disability discrimination claims to be maintained under the ADA if affected individuals failed to meet regulatory requirements to contact an EEO counselor or person of similar status within a given time after notice of discrimination. The Rehabilitation Act under 29 USC 791(g) follows the same standards as the ADA. This Court resolved those splits in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

Morgan held that in a series of separate discriminatory acts that collectively constitute one "unlawful employment practice" in a hostile work environment (HWE), if at least one act falls within the filing period, it does not matter that some of the component acts fall outside of the statutory time period. HWE claims involve repeated conduct, therefore they differ from discrete acts. Id. HWE acts include, among other things, physically threatening acts that interfere with an employee's work performance. Id. Discrete discriminatory claims were held to be not actionable, if time barred, even when related to acts alleged in timely filed charges. Id. Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Id. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "actionable employment practice." Id.

Dr. Vorosmarti's continuous refusal to grant Petitioner's requests for a RA was as "physically threatening" as could be, having caused Petitioner to endure oxygen desaturation episodes on the way to work. His denials were not merely unreasonable. They were harassing. Harassment need not be limited to verbal attack, but can also be accomplished by repeated misconduct such as that of Dr. Vorosmarti when he disregarded evidence before him and did not consult others qualified to evaluate Petitioner's requests

for RA. Petitioner's use of sick leave when he could have worked at home, and his need to delay beginning to work upon arrival at the office are interferences with his work performance. Consequently, Petitioner submits that he has demonstrated a hostile work environment that interfered with his work performance.

Petitioner met the 45-day deadline set by 29 CFR 1614.105(a)(1) one time by contacting an EEO Counselor on September 2, 1977, less than 45 days after July 23, 1997, when Dr. Vorosmarti denied Petitioner's request for a RA.

An affidavit by Petitioner's physiatrist should constitute evidence probative of Dr. Vorosmarti's denials of requests for RA as being violative of the Act. Under the Morgan rule, all of Dr. Vorosmarti's denials of Petitioner's requests for RA would be discriminatory, and be treated as "one unlawful practice." Hence, Petitioner submits that he is entitled to include all other denials of his requests for RA to maintain his employment disability discrimination claim.

Since Petitioner wasn't aware until September 2, 1998 of Dr. Vorosmarti's affidavit that was inconsistent with his denial memorandum where he wrote that he consulted another physician about Petitioner's case, Petitioner's time to establish contact with an EEO Counselor should have been extended from sometime in mid 1996 to 45 days after September 2, 1998. Where a continuing violation involves an employer's covert practice of discrimination over a period of time, an employee can only realize that he is a victim of discrimination after a series of acts has occurred, and the limitations period of Title VII or ADA begins to run when the employee gains such insight. Lewis v. Board of Trustees of Alabama State University, 874 F.Supp. 1299, 1302-03 (1995). Since Petitioner's initial contact with an EEO Counselor had been made before that date, his claim for that reason also should not be time barred.

The district court stated that Petitioner failed to contact an EEO counselor more than one year after first being denied a work at home schedule (Apx. 17A). In the Morgan case, Morgan failed to make his initial contact with a counselor for several years after his first incident of racial discrimination, yet that case was permitted to continue.

The district court opinion saying that only one decision was adverse to Petitioner was out of context. The word "opinion" in the complaint (Apx. 34A, ¶ 2) reflects collectively on the same opinion to continuously deny Petitioner's numerous requests for RA. To corroborate that point, the Complaint also states "On various occasions, I forwarded to Dr. Vorosmarti numerous items of correspondence---." (Apx. 32A). Consequently, more than one decision was adverse to Petitioner.

In light of the above, the courts below were wrong to such an extent, that this Count should be summarily reversed under the power of this Court.

**I (b). Lessons Learned From Treating Petitioner's Disability Can Benefit the Public Health.**

Lessons learned from treating Petitioner's disability can be useful to those without the same disability for treating other diseases without or with lower doses of drugs.

Dr. Vorosmarti's suggestion of tranquilizer use for Petitioner is misdiagnosis. Tranquilizers not only do not treat low oxygen levels that cause rapid heart rate. Petitioner as a pharmacist has seen many users of tranquilizers wind up using antidepressants. This observation is bolstered by information implicating the benzodiazepine tranquilizers on the website www.aafp.org/afp/2000040/2121.html

For people without Petitioner's disability, **exercise of the diaphragm muscle would strengthen it and enable an affected person to inhale more than a shallow amount of air** which contains about 20% oxygen. Oxygen levels would thus be raised, • heart rates would be slower, • diabetes would be controlled, and • sleep would come quicker and be of better quality.

These conditions could then be treated without drugs or with reduced dosages of drugs currently taken. Physicians are encouraged to check their patients' oxygen saturation levels, and if low, determine if their patients are chest breathers or diaphragm breathers. If they are chest breathers, they should be referred to physical therapists for exercise of their diaphragm muscles. Such a mode of treatment would have tremendous economic impact. It would confer safer treatment on persons who do not have Petitioner's disability and who can benefit from it without using other drugs or by using lower doses of their regularly used drugs for the same outcomes. Therefore, the reporting of this case has significant educational value for lay individuals and health care providers, and should be reported as widely as possible for the public benefit. It would look good for this Court, too. The public would be encouraged by hearing from the Court that there is a relatively easy way to combat widespread diseases.

## II. Eliminating the 45-day Requirement to Contact an EEO Counselor in Disability Discrimination Cases Would be Beneficial when Death is Foreseeable.

In cases of foreseeable death, eliminating the 45-day requirement for a disability discriminated individual to contact an EEO counselor would deter other would-be violators from continuing to violate the Act, and potentially save lives.

When a person has been discriminated against on the basis of handicap, and the discriminator has continually violated his position of trust, he has no incentive to stop when his victim hasn't contacted an EEO Counselor *ab initio*, because the victim would be time barred from suing. When this loophole has been taken away, the continuous violator would have more of a disincentive to continuously violate the Act. This disincentive does not exist under the current law. It is foreseeable that a person with a disability such as that of Petitioner could be caused to die if discrimination continued.

If this Court is concerned that allowing an exception to the 45-day rule would cause a proliferation of litigation for continuous violation discrimination cases, this exception is suggested only for persons with conditions where it is foreseeable that continuous discrimination can lead to death. Very few such cases are likely to arise. The suggested exception to the 45-day rule would not apply to cases of discomfort or worsening of conditions where death is not foreseeable.

**III. The Differences of Opinion in 2 Circuits on Whether a Cash Award Bonus Reduction to a Federal Employee Constitutes an "Adverse Employment Condition" in a Claim of Retaliation Needs Resolution.**

Count III---Retaliation

Elements of proof of retaliation require that a victim engage in a "protected activity," his employer take an "adverse employment action" against him, and that a causal connection exists between the protected activity and the adverse action. Munday v. Waste Management of North America, Inc., 126 F.3d 239, 242 (4th Cir. 1997), cert. denied, 522 US 1116 (1998). The key issue herein is whether there was an "adverse employment action."

A December 27, 1999 memorandum saying that Petitioner could work at home 2 days a week based on his performance over the past year, is expected to mean that his performance for 1999 was satisfactory at a minimum. The refusal to award a bonus to Petitioner was decided by the same second line supervisor who issued that memorandum, and is inconsistent with a "fails to meet" rating. Awarding cash bonuses for satisfactory performance is consistent with provisions of 5 USC 4503. By saying that "over the past year" meant the performance evaluation for 1998 rather than for 1999 is a question that should be decided by a jury.

Petitioner originally included a Count II retaliation claim which he is no longer pursuing. The retaliatory conduct is similar to that in this Count. Petitioner's former immediate supervisor issued a negative performance memorandum to Petitioner in 1997 shortly after he initially filed an EEO complaint. When a final performance rating was given for that year, she knew that different parts of Petitioner's work were reviewed by two people, yet she asked only one of them about his work. Consequently, Petitioner received an unbalanced rating lower than he deserved. That evidence is probative of course of conduct which also ought to be decided by a jury in this retaliation count when she issued a "fails to meet" rating shortly after he filed an Appellant's Brief with the EEOC's Office of Federal Operations.

Additional evidence of that course of conduct was presented to the district court showing that Petitioner's former immediate supervisor rated him low in one aspect of his work although she hadn't seen any writing samples in that rating period, and insufficient in another rating period when Petitioner cast the sole dissenting vote out of about 15 people on an issue, and it was ultimately accepted and used in a Federal Register publication. Petitioner submits that

evidence of that conduct is adequate to refute the district court opinion in Count II of Defendant's motivation for a negative evaluation (Apx. 19A-20A). Petitioner feels that the discussion of Count II in the district court opinion presumes her evaluation was legitimate, and that it creates a bad impression of his work quality, therefore he is including this paragraph to rebut that presumption.

Although, Petitioner's complaint did not allege facts of an adverse employment action, the evidence before the district court did. In the district court, Petitioner could amend his complaint pursuant to FRCP 15(a). Respondent's Motion to Dismiss or for Summary Judgment is not a responsive pleading pursuant to FRCP 7(a).

The 4th Circuit and the D.C. Circuit have differed on whether the reduction of a cash award bonus to a Federal employee constitutes an adverse employment condition in cases of a claim of retaliation.

The D.C. Circuit held that loss of a cash award bonus by a Federal employee was a substantial benefit and an adverse employment condition in a charge of retaliation. Russell v. Principi, Secretary of Veterans Affairs, 257 F.3d 815 (D.C. Cir 2001).

Russell stated that

- a bonus is a tangible, quantifiable award, more analogous to one's salary or to a benefit of one's employment than to a performance evaluation
- it has a more direct, measurable, and immediate effect
- the loss of a bonus that is worth hundreds of dollars is not a petty detriment.

Petitioner raised the Russell case in both courts below and neither one addressed it. Petitioner submits that Defendant's motive for making his 1999 performance evaluation as "fails to meet performance measures" was to make him appear as unqualified during the EEOC appeal. Thus, he could not comply with 29 CFR 1614.203(a)(6) as a "qualified" employee. That rating gave his second line supervisor a purported reason not to award him a bonus. As a result, he incurred an economic loss of that bonus, which according to Russell, was an "adverse employee condition."

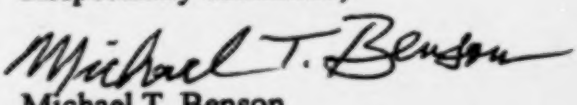
Although, this case in the 4th Circuit was unpublished, to Petitioner's knowledge, it still holds in that circuit as the only case covering the issue of whether a loss of a bonus by a Federal employee constitutes an "adverse employment action." The 4th Circuit opinion is silent, but in context with the district court opinion and evidence, the opinion holds by implication that loss of a bonus is not an adverse employment condition. Pursuant to 4th Circuit Court local rule 36(c), it can be cited as a precedent.

Resolution of the issue of whether denial of a bonus is an "adverse employment action" in this case is important because it affects thousands of Federal employees. Therefore, this retaliation count is worthy of review by certiorari, or for summary reversal.

## CONCLUSION

For the foregoing reasons, if summary reversal is not ordered, the petition for writ of certiorari should be granted for both the employee disability discrimination and retaliation counts.

Respectfully submitted,



Michael T. Benson
Pro Se
2703 Waco Court
Baltimore, MD 21209
410-484-7262 residence
301-827-2311 office

May 24, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 23, 2005

No. 04-1599
CA-02-3626-MJG

MICHAEL T. BENSON

Plaintiff - Appellant

v.

TOMMY G. THOMPSON, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Secretary of Health and Human Services

Defendant - Appellee

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied. entered for a panel composed of Judge Wilkinson, Judge Traxler, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor

CLERK

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 04-1599

---

MICHAEL T. BENSON
Plaintiff - Appellant

versus

TOMMY G. THOMPSON, Secretary of Health and Human Services
Defendant - Appellee

---

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge, (CA-02-3626-MJG)

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Submitted: October 1, 2004
Decided: October 27, 2004

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Before WILKINSON, TRAXLER, and SHEDD, Circuit Judges

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Affirmed by unpublished per curiam opinion.

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Michael T. Benson, Appellant Pro Se. Larry David Adams, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Michael T. Benson appeals the district Court's orders granting summary judgment to Defendant and denying Benson's motion for Reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Benson v. Thompson, No. CA-02-3626-MJG (D. Md. Mar. 22, 2004; Apr. 1, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

**AFFIRMED**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| MICHAEL T. BENSON | * | |
| Plaintiff | * | |
| v. | * | Civil Action No. MJG-02-3626 |
| | * | (EXEMPT FROM ECF) |
| TOMMY G. THOMPSON SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES | * | |
| Defendant | * | |

* * * * * *

**MEMORANDUM AND ORDER**

The Court has before it Plaintiff's Motion to Alter or Amend a Judgment and the materials submitted relating thereto. The Court finds that neither a response nor a hearing is necessary.

Plaintiff seeks reconsideration of this Court's grant of summary judgment to Defendant.

As stated by Judge Ramsey in Weyerhaeuser Corp. v. Koppers Co., Inc.:

> A motion for reconsideration (or to alter or amend judgment)

> made pursuant to Fed. R. Civ. P. 59(e) may be made for one of three reasons: (1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or prevent manifest injustice.

771 F. Supp. 1406, 1419 (D. Md. 1991) (citation omitted).

There has been no intervening change in the controlling law and there is no new evidence available. Moreover, this Court does not find that it made an error of law or perpetrated any injustice by its prior decision.

Inasmuch as Plaintiff wishes to continue to argue his case, he may, of course, pursue his appellate rights in the United States Court of Appeals for the Fourth Circuit.

For the foregoing reasons:

1. Plaintiff's Motion to Alter or Amend a Judgment is DENIED.

2. The Judgment Order issued Herein on March 22, 2004 remains in effect.

SO ORDERED THIS 1st DAY OF APRIL, 2004

/S/

Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| MICHAEL T. BENSON | * | |
| Plaintiff | * | |
| v. | * | Civil Action No. MJG-02-3626 |
| | * | (EXEMPT FROM ECF) |
| TOMMY G. THOMPSON SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES | * | |
| | * | |
| Defendant | * | |

* * * * *

MEMORANDUM AND ORDER

The Court has before it the Motion to Dismiss or for Summary Judgment (Paper 10) filed by Defendant Tommy G. Thompson, Secretary of the U.S. Department of Health and Human Services ("Defendant" or "HHS"), as well as the materials submitted by the parties related thereto. The Court finds a hearing unnecessary.

I. BACKGROUND[1]

Plaintiff Michael T. Benson

[1] The facts set forth herein are undisputed or stated in the light most favorable to Plaintiff Michael T. Benson.

("Plaintiff" or "Benson"), pro se, claims that Defendant, his employer, failed reasonably to accommodate him in light of his disability. Benson also accuses HHS of illegally penalizing him for attempting to vindicate his civil rights under federal disabilities law.

A. Plaintiff's Disability and Request for Accommodation

Benson is a pharmacist employed by the U.S. Food and Drug Administration ("FDA"), an agency within HHS. At all times relevant hereto, Benson has suffered from post-polio syndrome and sclerosis, which compromise his ability to breathe comfortably in certain situations.

In 1995 and 1996, Benson participated in his employer's Flexible Workplace Arrangements Program ("FWAP"), whereby he could work at home two days a week so long as he adequately performed his work obligations. Def.'s Ex. A (ex. 7, at 3). In April 1996, the FDA suspended Benson's participation in FWAP, citing poor performance on unsupervised projects. Id. (ex. 10, at 1). Benson was reprimanded for being absent without leave ("AWOL") for remaining at home after this suspension. Id. (ex. 10, at 3).

Following this incident, in May 1996, Benson informed his supervisors of his physical disability and requested, as an

accommodation thereof, to resume his FWAP arrangement.[2] Benson submitted medical documentation in support of his request. Dr. James Vorosmarti reviewed Benson's medical file on Defendant's behalf and on May 31, 1996, reported that the file did not support Benson's requested accommodation. Id. (ex. 15, at 10). Benson's request was denied.

B. Plaintiff's Equal Employment Opportunity Grievance

In September 1997, Benson began the process of presenting an Equal Employment Opportunity ("EEO") grievance; he contacted an EEO counselor regarding the refused FWAP accommodation. Def.'s Ex. A (ex. 1).

Within a month, the EEO counselor spoke to Benson's supervisor at the time, Dr. Linda Katz ("Katz"), regarding Benson's disability. At this meeting, Katz was overheard to have said "We'll have to do something about that." Pl.'s Ex. 24, Aff. of Benson, ¶ 11. In any case, informal attempts at resolving this dispute failed, and in November 1997, Benson filed a discrimination

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2 Benson appeared to evoke his rights under federal law. Def.'s Ex. A (ex. 9, at first (unnumbered page). Defendant claims this is the first time it was informed by Benson of his physical condition. Mem. In Supp. of Mot. to Dismiss or for Summ. J., at 4.

complaint against HHS with the Equal Employment Opportunity Commission ("EEOC"). Def.'s Ex. A (ex. 3).

Also in November, Benson received From Katz a memorandum negatively commenting upon his performance. Pl.'s Ex. 24, Aff. of Benson, ¶ 11. Apparently on the basis of this memorandum, Benson failed to receive a bonus in 1997. Id. At some point, Katz apologized to Benson for issuing the memorandum, indicating that "Personnel" compelled her to produce it. Id.

On May 25, 1999, an EEOC Administrative Law Judge ("ALJ") issued a decision denying Benson relief; The ALJ dismissed claims pertaining to the 1996 FWAP refusal as not timely filed, though he held that HHS was under a "continuing obligation" to provide Benson necessary and reasonable accommodations. Def.'s Ex. J, at 29-31. However, Benson's request (to work at home for part of the week) was deemed not to be such an accommodation. Id., at 61. In short, the ALJ held that Benson was not discriminated against on the basis of disability.

In January 2000, Benson appealed the ALJ's decision to a review office within the EEOC. Pl.'s Ex. 24, Aff. of Benson, ¶ 12.

Shortly thereafter, on February 1, 2000, Benson received another negative performance evaluation from Katz and other supervisors. Id. Benson challenged this performance rating before an FDA administrator, Dr. Robert J. Delap ("DeLap"), pursuant to the FDA's internal grievance resolution procedures. On June 8, 2000, DeLap determined that Benson's performance was measured by inapplicable criteria and accordingly directed that the performance evaluation be withdrawn from Benson's record. Def.'s Ex. W.

In August 2002, the EEOC affirmed the ALJ's decision regarding Defendant's denial of Benson's 1996 FWAP request. Def.'s Ex. K.

C. The Instant Civil Action

Benson herein alleges that the following conduct by Defendant violates the 1973 Rehabilitation Act and implementing regulations:

> Count I: the denial of a reasonable accommodation of Plaintiff's disability (i.e., FWAP participation) in 1996.
>
> Count II: the 1997 negative performance evaluation, which retaliated against Plaintiff for filing an EEOC complaint and resulted in lost compensation;

> Count III: the 2000 negative performance evaluation, which retaliated against Plaintiff for appealing the EEOC's initial finding of "no discrimination" and was ultimately withdrawn from Plaintiff's employment record.[3]

Compl. For Employment Discrimination and Retaliation, at 1, 7-10.

Defendant moves to dismiss these counts for failing to state a claim or, in the alternative, seeks summary judgment. Because both parties urge the Court to consider matters "beyond the pleadings" (affidavits, etc.), the Court treats this Motion as one for summary judgment. Fed. R. Civ. P. (12(b).

## I. LEGAL STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The well-established principles pertinent to such motions can be distilled to a simple statement.

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3 Counts II and III are collectively referred to hereinafter as the "Retaliation Counts."

The Court may look at the evidence presented in regard to the motion for summary judgment through the non-movant's rose colored glasses, but must view it realistically. After so doing, the essential question is whether a reasonable fact finder could return a verdict for the non-movant or whether the movant would, at trial, be entitled to judgment as a matter of law. E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp v.Catrett, 477 U.S. 317, 327 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Shealy v. Winston, 929 F.2d 1009, 1012 (4th Cir. 1991).

## II. DISCUSSION

### A. Count I

#### 1. The Reasonable Accommodation Claim is Time-Barred

Title 29, Part 1614 of the Code of Federal Regulations governs EEO procedures applicable to federal employees such as Benson; 29 C.F.R. § 1614.105(a)(1) provides:

> An aggrieved person must initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of personnel action, within 45 days of the effective date of the action.

Because complainants are required to exhaust EEO procedures before accessing this Court, the Court generally cannot consider matters not timely and properly addressed before the EEOC. See Zografov v. V.A. Med. Ctr., 779 F.2d 967, 968 (4th Cir. 1985).

As the ALJ rightly held, Benson failed timely to begin the EEO process with respect to the discrimination alleged in Count I. Benson was refused FWAP accommodations, following a review of his medical file, in May 1996. Def.'s Ex. A (ex. 15, at 10). He first consulted an EEO counselor on September 2, 1997, clearly more than forty-five days later. See Def.'s Ex. A (ex. 1).

1. No "Continuing Violation" is Alleged

Benson contends that his complaint was timely, inasmuch as he alleged a violation of law that continued, at least, into the fall of 1997. As the U.S. Supreme Court has stated. However, such "continuting violation" exceptions to limitation periods are quite narrow: "[D]iscrete acts that fall within the [regulatory] time period do not make timely acts that fall outside the time period." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112 (2002). This is generally so even where time-barred and non-time-barred acts are "related." Id., at 113.

Nevertheless, there is an established exception to the Morgan rule: Where various acts are alleged to have contributed to a "hostile work environment," the fact that limitations may have run on one or several of such acts does not preclude a court from considering them in determining whether a hostile work environment was in fact created. E. g., Fitzgerald v. Henderson, 251 F.3d 345, 361-62 (2d Cir. 2001). To establish a hostile work environment, a Plaintiff must prove, inter alia, actions sufficiently severe or pervasive to alter employment conditions. Spicer v. Va. Dep't of Corr., 66 F.3d 705, 709-10 (4th Cir. 1995).

Benson, however, does not allege a hostile work environment, nor does he present evidence of such conduct that in any way could suffice to create a hostile work environment. All Count I alleges, to ground liability, is an unreasonable and adverse decision by FDA administrators. Compl. For Employment Discrimination and Retaliation, at 7. This single act is neither severe nor pervasive. Benson nowhere alleges the kind of systemic harassment that significantly alters employment conditions. There is thus no appropriate context for this Court to consider the 1996 FWAP refusal (or any other events that occurred prior to approximately July 15, 1997).

2. Equitable Principles do not Counsel Exception

Even if the Court could, under principles of equity, waive the requirement that Plaintiff timely and properly exhaust EEO administrative procedures, this is not an appropriate case for the Court to do so. Benson had ample opportunity, after the 1996 FWAP refusal, to challenge the FDA's decision and contact an EEO counselor. He nevertheless failed to do so, until over a year later.

The Court should reserve its equity powers to ignore deadlines for those cases where it is necessary to correct a manifest injustice. See, e.g., Alexander v. Britt, 89 F.3d 194, 197 (4th Cir. 1996). The instant case presents no such circumstances.

B. The Retaliation Counts

A plaintiff may establish a prima facie case of illegal retaliation by showing: 1) that he engaged in a "protected activity;" 2) that his employer took an "adverse employment action" against him; and 3) that a causal connection exists between the protected activity and the adverse action. Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 242 (4th Cir. 1997) (citation omitted).

If the plaintiff establishes a prima facie case, an inference of retaliation arises. A defendant may rebut this inference by articulating legitimate, non-retaliatory reason(s) for its actions, for instance related to the plaintiff's job performance. Evans v. Technolgies Applications & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996). If such a reason is stated, the plaintiff may nevertheless establish liability if he shows that the reason is pretextual, by demonstrating either that: 1) the defendant's statements are not true; or 2) the proffered reason, even if factually supported, is not the actual reason for the defendant's decision. See Dennis v. Columbia Colleton Md. Ctr., Inc., 290 F.3d 639, 648 n.4 (4th Cir. 2002).

1. Count II

With respect to Count II, Benson has presented evidence adequate to establish that he engaged in protected activity (by filing an EEOC complaint). Moreover, crediting Plaintiff's version of the facts (as the Court must do in the instant summary judgment context), Benson suffered an adverse employment action: he received a negative performance rating in

1997, which resulted in a lost bonus.[4] See Boone, 178 F.3d at 255-56 (lost compensation signals as "adverse employment action"). The Court assumes, without deciding, that Benson has demonstrated some causal connection between the EEOC complaint and the 1997 rating and that therefore, Benson has established a prima facie case of retaliation.

Defendant, however, has articulated a legitimate motivation for the negative evaluation - namely, that Benson performed his duties poorly. E.g., Def.'s Ex Q, Decl. of Katz, ¶ 3 (Benson made an error in replying to a citizen petition). See Evans, 80 F.3d at 960 (reasons related to job performance are legitimate bases for adverse employment decisions). Benson has not produced evidence sufficient to raise genuine issues of material fact as to Defendant's justifications for its actions. Therefore, Benson cannot avoid summary judgment on this claim. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000).

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[4] Defendant initially misunderstood precisely which of Benson's performance evaluations Count II addressed. After Benson clarified his claim, Defendant acknowledged Count II to regard the November 1997 evaluation. Reply Mem. In Supp. of Mot. to Dismiss or for Summ. J., at 7 no. 3. Nowhere in its Reply Memorandum did Defendant refute Benson's allegation that he lost a bonus as a result of this negative evaluation.

Benson has not presented evidence adequate to refute the key facts underlying Defendant's justification; he does not deny that there were problems with his work performance. Benson suggests that Defendant's proffered explanation for its actions are pretext. He makes several challenges to Defendant's justification, which the Court considers in turn.

Benson cites Katz's comment to the EEO counselor, that "[w]e'll have to something about [Benson's complaint]", to evidence Defendant's retaliatory intentions. [Pl.'s] Reply Mem., at 23. This is not a reasonable interpretation of the comment, which, in context, expressed constructive rather than retaliatory feelings. To the extent, if at all, that a fact finder could construe the comment as indicating a retaliatory feeling on the part of Katz, even this would not suffice to raise a genuine issue of material fact in view of the totality of evidence in the case.

Benson also cites Katz's alleged apology for the 1997 evaluation. Id. According to Benson, Katz intimated that "personnel office people forced her to issue that memo[.]" Id. Assuming that this is true, it indicates only that Katz made a conciliatory rather than confrontational remark to Benson. In any event, even if the personnel office directed Katz to issue the negative

evaluation, the critical question is whether the evaluation was justified.

Benson seems to argue the temporal proximity between the EEOC filing and the 1997 rating indicates an illegal connection between the two events. However, mere proof of temporal proximity is insufficient to establish such a connection and cannot support an ultimate finding of retaliation. Shoaf v. Kimberly-Clark Corp., 294 F.Supp.2d 746, 758 (M.D. N.C. 2003)("Plaintiff cannot rely on temporal proximity alone to establish pretext"); see also Ingram v. Balt. Gas & Elec. Co., No. 02-2869, slip op. at 13 (D. Md. Feb. 25, 2004) (temporal proximity alone may not suffice even to establish a prima facie case); Mathis v. Perry, 996 F.Supp. 503, 518-19 (E.D. Va. 1997). This is so particularly where, as here, legitimate bases for an employers actions (e.g., criticisms of an employee's performance) predate considerably the protected activity allegedly retaliated against.[5] See id.

Benson suggests that Defendant's justification is pretext because the negative evaluation was an adverse action disproportionate to Benson's workplace shortcomings. According to Benson, the

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5 As detailed above, Benson's performance was called into question in April 1996, about seventeen months before the EEO process began.

key performance problem at issue - his erroneous reference to a specific deadline in FDA correspondence - was minor. Compl. for Employment Discrimination and Retaliation, at 3-4. Yet, as Benson concedes, there was more to this problem than just work-product mistake. Following the mistake, Benson's superior took measures to ensure that Benson be supervised more closely, which Plaintiff subsequently frustrated by going AWOL. Id.; Def.'s Ex A (ex. 10, at 3). Particularly considering Benson's work product problem together with his insubordination, Defendant's 1997 evaluation was not a disproportionate response.

Finally, Benson's work qualifications (listed, e.g., in [Pl.s] Reply Mem., at 4-7) do not undermine Defendant's contention that he perfomed his work poorly. Poor performance may undoubtedly accompany even spectacular qualifications.

In short, Plaintiff does not present evidence adequate to refute Defendant's articulation of a legitimate motive for its actions. No reasonable trier of fact could find that, in issuing the 1997 performance evaluation, Defendant acted with retaliatory intent. Accordingly, Defendant is entitled to summary judgment on Count II.

2. Count III

Benson has not presented evidence to establish a prima facie case of retaliation with regard to Count III. While Benson engaged in protected activity (by appealing an EEOC finding), he suffered no "adverse employment action" when Defendant negatively rated his work performance. Indeed, Defendant later withdrew this report from Benson's employment file so that the report had no substantial effect whatsoever.

United States Court of Appeals for the Fourth Circuit decisions indicate that an "adverse employment action," within the meaning of federal anti-discrimination law, is, generally, an "ultimate" action - i.e., a hiring, promotion, termination, or some other action with long-term effect, as opposed to an "interlocutory or mediate decision[.]" Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981). Because the FDA, upon further review of Benson's 2000 evaluation, rendered it essentially without effect, the negative comments included therein must be deemed "interlocutory."

Cases subsequent to Page suggest that, in rare circumstances, non-"ultimate" actions may suffice to ground liability. Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Jensvold v. Shalala, 829 F.Supp. 131, 136-37 (D. Md

1993). However, to constitute an "adverse employment action," such conduct by an employer must materially and detrimentally alter the terms, conditions, or benefits of the claimant's employment Boone v. Goldin, 178 F.3d 253, 255-56 (4th Cir. 1999); Jeffers v. Thompson, 264 F.Supp. 2d 314, 329 (D. Md. 2003) (citation omitted).

Benson's negative rating in 2000, withdrawn from his employment file some four months after it was issued, had no such material and detrimental impact.[6]

Accordingly, Defendant is entitled to Summary judgment with regard to Count III.

IV. CONCLUSION

For the foregoing reasons:

1. The Motion to Dismiss or for Summary Judgment filed by Defendant Tommy G. Thompson, Secretary of the U.S. Department of Health and Human Services [Paper 10] is GRANTED.

2. Judgment shall be entered by separate Order.

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6 Indeed, Benson has not shown that any loss in compensation resulted from the initially negative 2000 rating.

SO ORDERED this 22nd day of March, 2004.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| MICHAEL T. BENSON | * | |
| Plaintiff | * | |
| v. | * | Civil Action No. MJG-02-3626 |
| TOMMY G. THOMPSON SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES | * | (EXEMPT FROM ECF) |
| Defendant | * | |

* * * * *

JUDGMENT ORDER

By separate Order issued this date, the Court has granted summary judgment to Defendant.

Accordingly,

1. Judgment shall be, and hereby is, entered in favor of Defendant Tommy G. Thompson, Secretary, U.S. Department of Health and Human Services against all claims with prejudice with costs.

2. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

3. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 22nd day of March, 2004.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL T. BENSON
2703 Waco Court
Baltimore, MD 21209

Plaintiff

v. Civil Action No.:
MJG-02-3626

TOMMY G. THOMPSON
Secretary,
Department of Health and Human Services,
(Food and Drug Administration), Agency
200 Independence Avenue, S.W.,
Room 615-F
Washington, DC 20201

Defendant

**COMPLAINT FOR EMPLOYMENT DISCRIMINATION and RETALIATION**

FACTS APPLICABLE TO ALL COUNTS

1. Plaintiff is a resident of Baltimore County, Maryland.

2. Defendant does business at the following location: 9201 Corporate Boulevard, Rockville, MD 20855.

3. This action is brought pursuant to the Rehabilitation Act of 1973, as amended, §§ 791, *et seq.*, for

employment discrimination by a Federal agency on the basis of a disability, and pursuant to 29 CFR 1614.101(b) the regulation which implements 29 USC 791, *et seq*, for retaliation by that agency's officials.

4. I am complaining about (1) Federal agency officials refusing to let me work at home 2 days a week as a reasonable accommodation for alleviating my symptoms caused by post polio syndrome of the respiratory muscles together with severe scoliosis secondary to polio of the abdominal muscles, and (2) Federal agency officials retaliating against me twice for pursuing my complaint.

5. The conduct of Defendant's agents was discriminatory because it was based on disability.

6. The facts of my claim are: The conditions cited in paragraph 4 substantially impair my major life activities by significantly compromising my pulmonary function (breathing ability) and by causing me to become hypoxic (too low oxygen levels) and hypercapnic (too high carbon dioxide levels) at times; I have a record of such impairments and am regarded by Defendant as having such impairments.

I was on sick leave away from my office from November 30, 1994 until April 17, 1995 for the purpose of having spinal surgery and of recuperating from it in what turned out to be an unsuccessful attempt to improve my pulmonary function.

In March 1995 while recuperating from surgery, I was permitted to work from home 2 days a week in a program known as flexiplace and continued to work at home on Tuesdays and Thursdays; my flexiplace program continued when I returned to my office to work on April 17, 1995 and continued until April 18, 1996; numerous of my co-workers worked at home on the same program.

I resided and continue to reside in Baltimore County, MD approximately 1 hour and 15 minutes drive time from work in Rockville, MD where I worked and continue to work as a regulatory review pharmacist with the Food and Drug Administration (FDA).

I would have worked at home on 204 days from April 18, 1996 through January 28, 1999 had management allowed me; on those dates, I suffered the following symptoms in the morning while driving to work and after arriving at work: (1) could not inhale a sufficient volume of air as can be done normally (alveolar hypoventilation), (2) incurred a rapid heart rate, and (3) felt on the verge of

passing out. On arrival at my office, I had to take time to recuperate by leaning against a wall until those symptoms subsided and I felt able to work; an opinion by a respiratory therapist was that while driving, I had a desaturation (lowering) of oxygen levels in my body; I sensed that while recuperating at work, my oxygen saturation levels became restored so that I could work; on many of those drives, I felt relief by getting out of the car on the way to work and standing for a few minutes, but on days with inclement weather, this procedure was frightening.

On 4 other dates that I could have worked at home if permitted, I used sick leave because of feeling unable to cope with weather conditions.

On April 16, 1996 my former supervisor, Anne Mustafa (now deceased) told me that she stopped my use of the work-at-home schedule because she blamed me for drafting an issued letter which stated a specific date for a deadline instead of "until further notice." She said that I needed to be more closely "supervised."

Seeing that there was no difference In "supervision" when I was at the office, I sent an E-Mail message to Mustafa on May 6, 1996 asking for her authorization to work at home on May 7, 1996. I first received her response on May 7, 1996 as a

phone call at home approximately several minutes after 9:00 AM denying my request and ordering me to come to the office. I drove to the office and arrived shortly after 11:00 AM. Mustafa charged me with 1-3/4 hours of AWOL and my pay was reduced by $59.38. She issued a June 17, 1996 corrected reprimand for that AWOL charge.

On May 20, 1996, I raised my medical condition for seeking the accommodation to work from home and was referred to the Agency's Division of Employee Labor Relations (FDA's personnel office) whose representatives under the former Director, Ms. Kathryn Vengazo told me that I needed to submit documentation to the Agency's contract physician. I did that and my papers were referred to James Vorosmarti, Jr., M.D., a specialist in occupational medicine. On various occasions, I forwarded to Dr. Vorosmarti numerous items of correspondence including, among other things (1) a letter from one of my physicians that sitting in a car with a low seat can compromise the mechanics of respiration, and that since I am chronically hypoxic, this additional compromise can be detrimental to me, and (2) a copy of a Department of Health and Human Services (DHHS) fact sheet (NIH Publication No. 96-4030) which said that in general, post polio syndrome is not life threatening, however, the only exception is in patients who experience severe respiratory impairment.

Nothwithstanding the weight of the evidence submitted to him, Dr. Vorosmarti refused to consult with either of my physicians and refused to recommend a reasonable accommodation for me to work at home.

On or about April 1, 1997, Dr. Linda M. Katz became my immediate supervisor and did not allow my return to a flexiplace schedule until February 24, 1998 for one day only, then discontinued that schedule until some later time. I eventually figured out how to more effectively cope with my symptoms while driving to work; I began to use and continue to use a volume ventilator to increase my oxygen saturation levels and monitor those levels with a pulse oximeter before leaving for work. I was qualified to perform my job functions during the time when my work at home schedule was denied, and at no time did I ever receive a final sustained rating of less than "meets performance measures." After finding that certain of management's actions along with those of FDA's personnel office were adverse to me without justification, I joined the National Treasury Employees Union (NTEU) for possible protection against management adverse action, incurred union dues expenses of $402.98, and would not otherwise have joined NTEU.

I incurred attorney's fee expenses of $500.00 in this case when it was before the Equal Employment Opportunity Commission (EEOC), and am filing this case Pro se because of the significant expense of hiring legal counsel on a per hour noncontingent basis.

Dr. Vorosmarti's opinion refusing to grant me a reasonable accommodation to work at home 2 days a week disregarded the opinions of two physicians, a respiratory therapist and Defendant's written admission of danger; Dr. Vorosmarti had the opportunity to communicate with any of my health care contacts made known to him and did not do so.

Dr. Vorosmarti wrote that a Dr. Bradley agreed with him, and later signed an affidavit saying he didn't consult with any other physicians about my condition. I asked FDA's personnel office to assign my case to another physician. The request was denied.

**COUNT I**

Dr. Vorosmarti's opinion was false, malicious, in bad faith, and with deliberate indifference to my federally protected rights, and was known to be so by Ms. Kathryn Vengazo, former Director of FDA's personnel division. Had he given a recommendation for my requested reasonable accommodation, I would have

been spared the physical suffering described above.

WHEREFORE, Plaintiff asks the Court to grant such relief as may be appropriate, including but not limited to:

A. an award of compensatory damages of $3,000,000.00 against Defendant for physical suffering;

B. an award of compensatory damages of $59.38 against Defendant for 1-3/4 hours of pay deducted as AWOL from Plaintiff's salary;

C. rescission of his AWOL charge;

D. an award of compensatory damages of $402.98 against Defendant for dues paid to the National Treasury Employees Union;

E. an award of compensatory damages of $500.00 against Defendant for past attorney's fees;

F. rescission of Defendant's June 17, 1996 Corrected Reprimand issued to Plaintiff; and

G. restoration of 4 days (32 hours) of sick leave to Plaintiff's accrued sick leave time.

**COUNT II**

On September 2, 1997 I began FDA's EEO Complaint process. Afterwards, an EEO counselor, Charles Arp went with me to introduce himself to my former immediate supervisor, Dr. Linda M. Katz and discussed aspects of my EEO complaint with her.

I clearly heard Dr. Katz remark "We'll have to do something about that." and she did, by issuing a "Performance Memo" prepared under the direction of Ms. Kathryn Vengazo formerly of FDA's Personnel office. I found that memo demeaning and substantially incorrect and issued a reply memo.

The issuance of the "Performance Memo" was in retaliation for my filing an EEO complaint and caused me unnecessary anguish.

WHEREFORE, Plaintiff asks the Court to grant such relief as may be appropriate, including but not limited to:

A. an award of compensatory damages of $500,000.00 against Defendant.

**COUNT III**

By memorandum dated December 27, 1999, Dr. Charles Ganley, supervisor to Dr. Linda M. Katz wrote that I could work

a flexiplace schedule based on my performance over the past year; I was on leave after that date for the remainder of 1999. On January 24, 2000, I filed an Appellant's Brief with the Office of Federal Operations (OFO) of the EEOC and sent copies to the agency and its attorney.

On January 31, 2000, Dr. Katz' final performance evaluation of me was "fails to meet performance measures." On February 1, 2000, Dr. Ganley signed the paper as a reviewing official, and hadn't seen any of my work for the period being rated. Ms. Theresa Foster of FDA's personnel office influenced both Drs. Katz and Ganley on how they prepared my performance evaluation for that time and was aware of my having filed an Appellant's Brief to the EEOC decision. I successfully appealed that performance rating, and it was stricken.

An FDA personnel employee informed DHHS' Office of General Counsel that my performance rating for 1999 was "fails to meet performance measures." That information was written in the Agency's Appellee's Brief filed February 22, 2000 when this case was in EEOC's OFO.

The "fails to meet performance measures" rating was in retaliation for my maintaining an EEOC complaint and was designed in bad faith to make me appear

as an unqualified employee for litigation purposes of that complaint. That rating caused me much anguish and sleepless nights.

WHEREFORE, Plaintiff asks the Court to grant such relief as may be appropriate, including but not limited to:

A. an award of compensatory damages of $500,000.00 against Defendant.

7. The approximate number of people employed by Defendant is thousands.

8. The events I am complaining about took place on the following dates or time period: April 18, 1996 through February 22, 2000.

9. I filed charges on the following dates:

(1) November 12, 1997
FDA's Office of Equal Employment and Civil Rights (Agency Case No. FDA-D-012-98),

(2) December 15, 1998
Equal Employment Opportunity Commission (EEOC Case No. 120-99-6120X),

(3) January 24, 2000
EEOC's Office of Federal Operations (Docket No. 01A01719).

10. I received a right to sue letter (copy attached) on the following date: August 12, 2002.

**JURY DEMAND**: Plaintiff demands a jury on all issues which can be heard by a jury.

/s/

MICHAEL T. BENSON
Pro Se
2703 Waco Court
Baltimore, MD 21209
410-484-7262 residence
301-827-2311 office

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**Office of Federal Operations**
**P.O. Box 19848**
**Washington, D.C. 20036**

Michael T. Benson
Complainant

v.

Tommy G. Thompson,
Secretary,
Department of Health and Human Services
(Food and Drug Administration),
Agency

Appeal No. 01A01719
Agency No. FDA-D-012-98
Hearing No. 120-99-6120X

**DECISION**

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts the complainant's appeal in the above-entitled matter. The record reveals that complainant filed a formal EEO complaint alleging that the agency had discriminated against him on the basis of disability (post polio syndrome) when he was denied permission to work at home two days per week. At the conclusion of the investigation, complainant was provided a copy of the investigative report and requested a

hearing before an EEOC Administrative Judge. Following an oral hearing on the agency's motion for summary judgment, the Administrative Judge determined that summary judgment was appropriate and issued a decision, finding no discrimination. The agency did not issue a final order, and consequently, the Administrative Judge's decision became the agency's final action. 29 C.F.R. § 1614.109(i).

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Commission to affirm the agency's final order, because the Administrative Judge's issuance of a Decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0701)

The Commission may, in its discretion, Reconsider the decision in this case if the complainant or the agency submits a written request containing argument or evidence which tend to establish

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within 30 (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for

reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. *See* 29 C.F.R. § 1614.604(c).

## COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0900)

You have the right to file a civil action In an appropriate United States District Court **within ninety (90) calendar days** from the date you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

## RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit

you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

/S/
Carlton M. Hadden, Director
Office of Federal Operations

Aug 07 2002
Date

**CERTIFICATE OF MAILING**

**For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:**

Aug 07 2002
Date

/s/ (illegible)
Equal Opportunity Assistant

## RELEVANT STATUTUORY AND REGULATORY PROVISIONS, AND RULES

Rehabilitation Act of 1973, as amended
**29 U.S.C. § 791 Employment of individuals with disabilities**

**(b) Federal agencies; affirmative action program plans**
Each department, agency, and instrumentality---in the executive branch and the Smithsonian Institution shall submit to the Commission (EEOC) and to the Committee (Interagency Committee on Employees who are Individuals with Disabilities) an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met.

**(g) Standards used in determining violation of section**

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the American Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Americans with Disabilities Act of 1990
**42 U.S.C. § 12201 Construction**
**(a) In General**

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied for under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790, et seq.) or the regulations issued by Federal agencies pursuant to such title.

**42 U.S.C. § 12203. Prohibition against retaliation and coercion**

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Government Organization and Employees
**5 U.S.C. § 4503. Agency awards**

The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who—

(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or

(2) performs a special act or service in the public interest in connection with or related to his official employment.

## RELEVANT REGULATORY PROVISIONS AND RULES

**29 CFR 1614.203 Rehabilitation Act.**

(a) *Definitions*—(1) *Individual with handicap(s)* is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) Has a record of such impairment; or

(iii) Is regarded as having such an impairment.

(2) *Physical or mental impairment* means

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; Neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic and lymphatic, skin, and endocrine; or--------

(3) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more of major life activities.

(5) Is *regarded as having such an impairment* means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

(6) *Qualified individual with handicaps* means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used;

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question; or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) *Reasonable accommodation.* (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with handicaps; and

(ii) Job restructuring, part-time or modified work schedules acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c) (1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and cost of the accommodation.

**29 CFR 1614.105 Pre-complaint processing**

(a) Aggrieved persons who also believe they have been discriminated against on the basis of-----handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

United States Court of Appeals for the 4th Circuit
**Local Rule 36(c) Citation of unpublished dispositions**

-----If counsel believes,----, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.----

Federal Rules of Civil Procedure

**Rule 7(a)—Pleadings**

There shall be a complaint and an answer; a reply to a counterclaim denominated as such, an answer to a cross-claim, if the answer contains a cross-claim, a third party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

**Rule 15—Amended and Supplemental Pleadings**

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, ----. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.